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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

VINCENT ZUCKERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Even assuming an intent on the part of the purchaser not to pay for merchandise received on credit, do the mailings of invoices from the seller to the purchaser satisfy the "in furtherance" requirement of the federal mail fraud statute?

LIST OF PARTIES

All parties appear in the caption of the case.

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Petitioner, VINCENT ZUCKERMAN, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

CITATIONS TO OPINION BELOW

There are no reported decisions below. The opinion of the Seventh Circuit Court of Appeals affirming the jury's verdict in the District Court is attached as Exhibit A.

JURISDICTIONAL BASIS

Judgment was entered against the petitioner on April 14, 1981. The Seventh Circuit affirmed that judgment on January 15, 1982. A petition for rehearing en banc was denied on May 26, 1982. Petitioner seeks a writ of certiorari pursuant to 28 U.S.C. § 1254(1) and Rule 22.2 of the Rules of this Court.

STATUTES INVOLVED

18 U.S.C. § 1341:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

The government charged Vincent Zuckerman in a five count indictment alleging violations of the mail fraud statute, 18 U.S.C. § 1341. The government charged that Zuckerman had devised a scheme whereby he ordered television sets and video cassette recorders from Zenith Distributing Company, not intending to pay for the merchandise. According to the government, Zuckerman placed five orders for merchandise. Each time, Zenith shipped the merchandise to Zuckerman by truck on the day ordered, and on the next day mailed an invoice to Zuckerman for the balance due. Zenith's billing policy enabled Zuckerman to make the last four orders before the first invoice fell due. The five invoices mailed by Zenith formed the basis for the mail fraud indictment, and the jury returned verdicts of guilty on each count.

On appeal to the Seventh Circuit, Zuckerman argued that the mailings of the invoices did not sufficiently further the alleged fraudulent scheme to constitute mail fraud. The appellate court rejected this argument, with Judge Fairchild, former Chief Judge of the Seventh Circuit, dissenting. Noting that Zuckerman appeared aware that payment would not fall due for 30 to 45 days from the date of shipment, the two majority judges found the mailings of the invoices to be "necessary to the successful outcome of [the] scheme," and "the primary feature of the billing system which Zuckerman sought to take advantage of in order to succeed in his plan to defraud Zenith." Memorandum op. at 6. As Zuckerman arguably could have paid for the merchandise upon receipt, the panel concluded that Zuckerman "triggered the mailings," because he did not request Zenith to send the merchandise C.O.D. The Court held that the mailings, therefore, "created the time frame for the fraud." *Id.*

Voting for reversal in a dissenting opinion, Judge Fairchild reasoned that

> The mailing of invoices was an ordinary feature of Zenith's sales on credit, and certainly resulted from his activity. But that particular feature provided no advantage to the defendant. The mailings did not grant or induce the victim to grant the defendant credit. They did not extend the due date, delay discovery, or render the extension of credit more exposed to fraudulent exploitation. At most they triggered the count down toward the expiration of the credit period.

Memorandum op. at 11. Judge Fairchild therefore concluded that the mailings did not sufficiently further the alleged fraudulent scheme to constitute mail fraud.

REASONS FOR GRANTING THE WRIT

EVEN ASSUMING AN INTENT ON THE PART OF THE PURCHASER NOT TO PAY FOR MERCHANDISE RECEIVED ON CREDIT, THE MAILINGS OF INVOICES FROM THE SELLER TO THE PURCHASER DO NOT SATISFY THE "IN FURTHERANCE" REQUIREMENT OF THE FEDERAL MAIL FRAUD STATUTE.

Essentially, this case raises the question of whether invoices mailed by a seller to a purchaser pursuant to a credit transaction are sufficient to bring that transaction within the scope of the federal mail fraud statute. The Seventh Circuit Court of Appeals' decision here, answering that question in the affirmative, potentially makes nearly every credit transaction subject to prosecution for mail fraud in federal court. That position by the Seventh Circuit requires review for three compelling reasons. First, the Seventh Circuit invests the mail fraud statute with a broad scope clearly not envisioned by Congress. Second, the decision by the Seventh Circuit contradicts *United States* v. *Maze*, 414 U.S. 395 (1974), which is this Court's major statement on the scope of the mail fraud statute. Finally, the decision has created a split in the federal circuits, with the Fourth and Fifth Circuits deciding similar issues in an opposite manner.

A.

The Seventh Circuit Erroneously Interpreted the Mail Fraud Statute to Include any Case Where a Purchaser Fails to Pay for Goods or Services Received on Credit.

The Seventh Circuit's decision injects unparalleled breadth into the mail fraud statute, creating a federal crime in nearly every instance where a purchaser fails to pay for goods or services received on credit. As this is the first case in the federal courts to confront directly the role of mail fraud in the context of an ordinary credit transaction, petitioner respectfully asks that this Court grant a writ of certiorari so that the broad view of the Seventh Circuit can be reviewed and ultimately rejected.

The government charged that Vincent Zuckerman ordered goods from Zenith over the telephone, knowing that he would not have to pay for the goods for thirty to forty-five days. In each instance, Zenith immediately shipped to Zuckerman the ordered merchandise by truck, and mailed him an invoice the next day. It has been Zuckerman's contention that these mailings did not further his alleged scheme, and therefore they were not "sufficiently closely related" to the scheme to constitute mail fraud. Zuckerman apparently knew about Zenith's credit policy prior to ordering the merchandise; this knowledge enabled him to order the merchandise from Zenith knowing that the payment would not immediately fall due. But any credit customer of Zenith would have a prescribed time to pay, and the customer would have this prescribed time regardless of whether Zenith mailed out invoices for the merchandise purchased. Thus, Zenith's credit policy existed entirely independent from whether invoices were mailed or not. The Seventh Circuit turned the situation upside down by concluding that the mailings "triggered" the credit policy; if anything, it was the credit policy that triggered the mailings.

The repercussions from this decision would be enormous. By holding the mailings sufficiently closely related to the

scheme, the Seventh Circuit would find a case of mail fraud in every credit transaction where the buyer intentionally fails to pay. Every credit transaction involves delay, and every credit transaction precipitates mailings, either for the total amount due or for the amount yet unpaid. As a result, the Seventh Circuit has offered the mail fraud statute as a remedy for every merchant or seller who has customers who have not paid their bills. Indeed, the federal court would now provide a more attractive forum for bill collectors than the state court: the creditor need not employ a private attorney and the creditor may achieve not merely an order for "restitution" and hence repayment, but he or she would also gain the undeniable and often understandable satisfaction of seeing his or her debtor convicted and perhaps confined to jail for their failure to make payment. In short, the decision turns the federal government into a collection agency without parallel for unsatisfied creditors.

A few examples illustrate the potential reach of the Seventh Circuit's interpretation of the mail fraud statute. If an individual charges for merchandise at a department store, or enters into any kind of purchase agreement that involves possession of merchandise while full payment remains outstanding, an intentional failure to pay would be mail fraud. If, according to this decision, Zuckerman "triggered the mailings" by ordering the merchandise while knowing "that a mailed invoice would not be due" for a certain period of time, then so would the retail customer have triggered the mailing knowing that the mailed invoice from the department store would not immediately be due when he or she obtained the merchandise on credit. If the court's analysis on "triggering" the mails is the standard, then the simplest retail credit transaction, such as the one described above, would potentially fall under the purview of the federal mail fraud statute.

Similarly, if an attorney agrees to go to court for a client, and the attorney subsequently mails the client a bill, in the

Seventh Circuit the client has committed mail fraud if he or she thereafter intentionally fails to make payment. Should the client pay half the bill before the attorney goes to court, inducing the attorney to later mail a bill for the balance, the client's subsequent intentional failure to remit the balance would be mail fraud. Just as in this case, the client could be said to have triggered the mailing when he or she did not pay cash up front but relied on the attorney's policy to perform a service and bill later.

The problem with this analysis is that it considers the mailing itself as stimulating the credit policy. Thus, in the attorney-client example above, the Seventh Circuit, to be consistent, would have to say that the mail fraud arose when the attorney mailed the bill, because mailing the bill triggered the credit policy. Of course, the mailing of the bill did not trigger the credit policy—the credit policy existed whether the bill was mailed or not. What made the client's hypothetical scheme possible was not a credit policy triggered by a mailed invoice, but a credit policy triggered by the attorney's decision to go to court in the absence of full payment. Likewise, in the department store example, the store's credit policy would not be triggered by the mailed invoices, but by the store's initial decision to give the customer merchandise while the bill remained unpaid. Zuckerman's case is no different: Zenith's mailed invoice did not set the credit policy in motion; rather, the credit policy was triggered by Zenith's initial decision to ship the merchandise after receiving the order over the telephone.

Congress clearly did not intend to pass a statute that would make a federal crime of nearly every credit transaction where an outstanding bill exists. Instead, it sought to limit mail fraud to those cases where people exploit our postal system as a step towards receiving the fruit of a criminal venture. *United States* v. *Stasczuk*, 502 F. 2d 875, 880 (7th Cir. 1974). The mail fraud statute simply does not reach all frauds: it reaches only

those limited instances where the mail use actually furthers the scheme's execution. *Parr* v. *United States*, 363 U. S. 370, 389-90 (1960); *Kann* v. *United States*, 323 U. S. 88, 95 (1974). In Zuckerman's case, as in the department store and attorney-client examples above, the mails played no role in the execution of the scheme. The alleged schemers obtained the fruits of their alleged schemes when the merchandise or service was delivered or completed and the later mailings did not alter that fact or aid the scheme or hide it from detection. The credit policies in each case existed regardless of whether the invoices were later mailed. As described by the dissenting judge below, the mailings at most "triggered the count down toward expiration of the credit period." Other than that, however, the mailings played no role in the credit policy.

Thus a failure to pay pursuant to an ordinary credit transaction does fall under the ambit of the mail fraud statute. Petitioner therefore respectfully requests that this Court issue a writ of certiorari so that the proper reach of the statute can be settled with finality.

B.

The Seventh Circuit's Decision Contradicts the Leading United States Supreme Court Decision on Mail Fraud.

United States v. *Maze*, 414 U. S. 395 (1974), establishes the benchmark against which all subsequent mail fraud cases have been measured. In *Maze* the defendants used a stolen credit card to obtain food and lodging at several hotels, causing the hotels to mail invoices representing the food and services furnished to the bank that issued the credit card. This Court held that the action did not fall under mail fraud because the mailings did not further the fraudulent schemes, the scheme having been completed, having reached "fruition," before the bills were mailed. The instant case presents the same situation, except that in *Maze* the defendants used a stolen credit card to

obtain credit while here the defendant obtained credit through alleged use of oral misrepresentations. Just like Zuckerman, the defendants in *Maze* obviously knew that a delay would exist between the time they received the goods or services and the time that payment would fall due, and just like Zuckerman, the defendants in *Maze* obtained their goods before the invoices were ever mailed. Accordingly, this Court should grant certiorari so that the issue raised here can be decided in conformity with *Maze*.

The Seventh Circuit applies faulty and inconsistent reasoning in an effort to distinguish this case from *Maze*. It notes, for example, that in *Maze* the defendants would have preferred the bills never to have been mailed at all, implying that Zuckerman's alleged scheme was somehow aided by the mailed invoices. Yet just like the defendants in *Maze*, Zuckerman's scheme was jeopardized by the mailings, and Zuckerman would have preferred no mailings at all. The failure of Zuckerman to remit the balances reflected in the mailed invoices threatened to expose Zuckerman's alleged scheme, just as the mailings in *Maze* threatened the defendants' scheme when the party receiving them learned that the bills were made on stolen credit cards. Thus, Zuckerman had no more interest in inducing these mailings than did the defendants in *Maze*.

Further, the Seventh Circuit purports to distinguish *Maze* by holding that the mailings here "implemented the billing policy that made Zuckerman's scheme possible. In effect, the mailings were similar to cases where the mailings are used to lull the victim into thinking that conduct which is in fact fraudulent is actually legitimate." Memorandum op. at 6-7. Yet the mailings here, as in any credit situation, did not implement the billing policy; the billing policies existed independent from the mailings. And Zuckerman no more "lulled" Zenith into thinking his conduct was legitimate than did the defendants in *Maze* lull the hotels into thinking their conduct was legitimate when those hotels mailed bills to the bank that

issued the credit card. It is simply illogical to conclude that the defrauded party in either case could be "lulled" into nonaction because it mailed something in the ordinary course of its business.[1]

The problem with the Seventh Circuit's analysis is that it inexplicably shifts emphasis when it analyzes this case after analyzing *Maze*. The billing policy in *Maze* was implemented when the hotels accepted the stolen credit card from the defendants to purchase goods and services. Similarly, the billing policy in this case was implemented when Zenith extended credit to Zuckerman after speaking with him over the telephone. Rather than recognizing this basic similarity between the two cases, the Seventh Circuit reversed the emphasis and found that Zenith's credit policy was not implemented until Zenith placed the invoices in the mails. But if this were true, then the Seventh Circuit would interpret the *Maze* situation so that the credit policy was not implemented until the hotels placed their invoices in the mails. Therefore, acceptance of the Seventh Circuit's rationale on this point would mean that the Seventh Circuit would overrule this Court's decision in *Maze*. This Court should grant a writ of certiorari so that the law in the Seventh Circuit can be brought into conformity with *Maze*.

C.

The Seventh Circuit's Decision Is Inconsistent With Decisions From Other Federal Circuits That Have Considered Similar Issues.

Not surprisingly, federal courts in other jurisdictions considering similar issues have reached the opposite conclusion

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[1] Ironically, the government could have made a stronger case for "lulling" had it charged Zuckerman with mail fraud based on Zuckerman's mailing payment for the first invoice prior to his placing the last four orders. *See* Memorandum op. at 11 (Judge Fairchild, dissenting).

from that reached by the Seventh Circuit. For instance, in *United States* v. *Keenan*, 657 F. 2d 41 (4th Cir. 1981), the defendants used a fabricated purchase order purportedly from Marathon Coal Bit Co., Inc. to pick up construction material from a company called Carboloy. Carboloy, in the course of its business, mailed an invoice for this purchase to Marathon. The government charged that this mailing created an action for mail fraud. The Fourth Circuit analogized the case to *United States* v. *Maze, supra*, and held that it was not mail fraud because the mailings did not further the fraudulent scheme. *Id.*, 657 F. 2d at 43.

In the Fifth Circuit case of *United States* v. *Green*, 494 F. 2d 820 (5th Cir. 1974), *cert. denied*, 419 U. S. 1004 (1975), the defendants obtained credit cards by misrepresenting their creditworthiness. They used the credit cards to purchase tires from a gasoline station. The station mailed invoices for the purchases to the credit card company, and these mailings formed the basis for mail fraud charges. On appeal, the court held, and the government itself conceded, that the mailed invoices could not provide the basis for mail fraud.

The Seventh Circuit's decision in *Zuckerman* contradicts the opinions in *Keenan* and *Green*. In all three cases the defendants received goods on credit and the defrauded companies mailed invoices for the amounts due. The Fourth Circuit in *Keenan* and the Fifth Circuit in *Green* concluded that the mailings were too attenuated from the alleged schemes to be mail fraud. By deciding the opposite way, the Seventh Circuit is inconsistent with other federal courts. Accordingly, this Court should grant certiorari so that the proper application of mail fraud to credit transactions can be addressed once and for all.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a writ of certiorari be issued to review the judgments below.

Respectfully submitted,

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Unpublished Order
Not To Be Cited
Per Circuit Rule 35

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

ARGUED DECEMBER 7, 1981
January 15, 1982

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 81-1674 *vs.*

VINCENT ZUCKERMAN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 80 Cr 208

Marvin E. Aspen,
Judge.

ORDER

Defendant Zuckerman appeals his conviction for violation of the federal mail fraud statute, 18 U.S.C. § 1341 (1980). Zuckerman argues that (1) the government failed to establish beyond a reasonable doubt the existence of any fraudulent scheme; (2) the mailings alleged in the indictment were insufficiently related to any "scheme" and therefore do not fall within the prohibitions of the federal mail fraud statute; (3) the jury was instructed erroneously on the requisite relationship between the mailings and the scheme; and (4) the trial court abused its discretion in allowing highly prejudicial testimony concerning Zuckerman. Because we find that the evidence was sufficient to support the jury's verdict and that no error was committed by the district court, we affirm the conviction.

I

Zuckerman was indicted for five counts of mail fraud arising out of his business dealings as a hospital supply salesman. From June, 1977, to October, 1978, Zuckerman operated a hospital supply business from three different addresses under the names Good Samaritan Hospital Supply Corporation, Pahsco Co., Physicians Supply Company, Physicians Supply Division, Doctors Supply Corporation, and Surgical Supply Corporation. During the same period, Zuckerman used the aliases James Breen, George Weiss, and James Murphy in his business dealings. The indictment alleged that Zuckerman, representing himself to be George Weiss, of Good Samaritan Hospital Supply Corporation, ordered television sets and videotape recorders from Zenith Distributing Company with no intention of paying Zenith for the merchandise. Zuckerman allegedly placed, and paid for, an initial order of two television sets. Zuckerman then made six substantial orders in less than a month for a toal of over $24,000 in Zenith products. The indictment charged that Zuckerman intended to sell these products before the bills from Zenith came due, and never pay Zenith for the products. The five counts of the indictment were based on five separate invoices sent to Zuckerman on orders he placed between September 29, 1978 and October 24, 1978.

At trial, the government introduced evidence of Zuckerman's business dealings which demonstrated a pattern of conduct which even Zuckerman concedes was "unorthodox." In June, 1977, Zuckerman leased a storefront in the name of Good Samaritan Hospital Supply Corporation at 9006 Waukegan Road, Morton Grove, Illinois. Two months later, in August, 1977, Zuckerman, posing as "James Breen," leased a second storefront at 2343 West Irving Park Road in Chicago. The store was rented on behalf of Pahsco Company to sell medical supplies, and "Breen" claimed to be the vice-president of Pahsco. A few weeks later the lease was reexecuted at the

request of "Breen" in the name of Physicians Supply Company. Signs designating the business as "Physicians Supply Division" and "Doctors Supply Corporation" were hung at the Irving Park store.

In August Zuckerman applied for a post office box for mail delivered to Good Samaritan Hospital Supply at the Waukegan Road address. He subsequently filed a change of address form for the box, listing the Irving Park store as the business' new address. In late August, Zuckerman opened a bank account for Good Samaritan Hospital Supply, listing himself and two other names, Meyer Kaplan, M.D. and Patrick Fitzgerald, on the signature card. The addresses listed for Kaplan and Fitzgerald were fictitious.

In September, 1978, Zuckerman rented a third storefront at 6143 Touhy in Chicago. Zuckerman signed the lease as "James Murphy," president of Surgical Supply Corporation. Zuckerman also closed the Waukegan Road storefront in September, moving the remaining equipment to the Touhy address.

Zuckerman's dealings with Zenith began in late August of 1978, shortly before he abandoned the Waukegan Road storefront. Under the name "George Weiss," Zuckerman contacted Zenith on behalf of Good Samaritan Hospital Supply to request price sheets and information on how "Weiss" could become a Zenith dealer. Normally Zenith would have required a financial statement, a credit reference, and a bank reference before opening a new account. Zenith did not require this information, however, because Zenith's credit manager mistakenly assumed the corporation was somehow affiliated with Good Samaritan Hospital. "George Weiss" placed his first order from Zenith on August 30, 1978, for two seventeen-inch color televisions. The order was shipped to Good Samaritan Hospital Supply at the Waukegan Road address. Zenith mailed the billing invoice on September 5, 1978. Under Zenith's billing procedure, payment for anything billed and shipped through the 25th of the month was due approximately the 10th of the

following month. In practice, according to Zenith's credit manager, bills fell due about thirty days after merchandise was shipped. Thus, the August 30 order from Good Samaritan Hospital Supply was due to be paid on October 10. Zenith received full payment for the order sometime between October 10 and 12. The check was drawn on the corporate account of Good Samaritan Hospital Supply and was signed by "Meyer Kaplan."

Beginning September 29, 1978, "George Weiss" made six additional orders from Zenith in less than a month. Orders were placed on September 29, October 2, October 13, October 18, October 23 and October 24. The first two orders were billed and shipped to the Waukegan Road address. The remaining four orders were billed to the vacant Waukegan Road address and shipped to the Irving Park address. Five invoices were sent for these orders, with the fifth invoice reflecting the combined orders of October 23 and October 24. The merchandise was primarily color television sets and videotape recorders, with a total value of $24,012.17.

Zenith became suspicious at the end of October concerning the orders from Good Samaritan Hospital Supply. "George Weiss" had called Zenith on October 24 to inquire whether any special Christmas prices would be available on videocassette recorders. "Weiss" had been very reluctant to leave a phone number where he could be reached to answer his inquiry. When a Zenith employee tried to return the call to the number "Weiss" had given, there was no answer. The phone number "Weiss" had given to Zenith was registered to Zuckerman.

Zenith's in-house investigators were notified of the October 24 incident by the assistant credit manager. The same day, an investigator called the phone number "Weiss" had left but was unable to reach "Weiss." The investigator then drove to the Waukegan Road address and noted that the store was vacant and no signs were posted. The investigator also drove past the Irving Park address and saw two signs posted, "Physicians

Supply Division" and "Doctors Supply Division." Displayed in the window of the Irving Park store were hospital and medical supplies. On October 26, 1978, two investigators conducted a surveillance of the Irving Park Road address during the delivery of the most recent Zenith order to Good Samaritan Hospital Supply. They then walked past the store and noted that a temporary cardboard sign, "Good Samaritan Hospital Supply Corporation," had been taped to the door. The Zenith investigators also met with two Chicago police officers, who told the investigators that Zuckerman was a "con man" and that they "better get in there before that stuff disappears out the back door." The Zenith investigators then entered the store and repossessed the merchandise they had watched being delivered.

Zuckerman made no further payments to Zenith on any of the orders, leaving a final balance due, after deducting the value of the repossessed merchandise, of $22,567.00. Zuckerman subsequently sold some of the Zenith merchandise at below cost. In late 1978, Dr. Henry Dold and his associate purchased two videocassette recorders from Zuckerman's Surgical Supply Company office on Touhy. Zuckerman sent the two doctors invoices which showed that the doctors were buying syringes. Dr. Dold and his associate returned the invoices and requested proper invoices showing the sale of videocassette recorders. Zuckerman subsequently provided corrected invoices. From March through May of 1979, Zuckerman traded television sets to Victor Klubeck, another medical supply dealer, in exchange for allergy syringes. In each case, the prices charged by Zuckerman for the television sets were below his cost.

Zuckerman was indicted on April 2, 1980. At trial, Zuckerman presented certain exhibits, but no testimony. On January 22, 1981, the jury found Zuckerman guilty on all five counts. On April 14, 1981, Zuckerman was sentenced to one year of imprisonment on Count One, four years probation on

Counts Four and Five, and fined one thousand dollars for each of the five counts. In addition, Zuckerman was ordered to pay full restitution to Zenith in the amount of $22,567.00. Appeal was timely filed on April 23, 1981.

II

A

Zuckerman argues that his conviction cannot be upheld because the government failed to show that he devised a "scheme" to defraud. All the government established, according to Zuckerman, was that he engaged in "unorthodox" business practices and failed to pay for merchandise ordered from Zenith. Without any evidence of a "scheme," an essential element of mail fraud was absent from the government's proof.[1]

" 'The law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity.' " *United States v. Stanford*, 589 F.2d 285, 296 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979) (quoting *Weiss v. United*

[1] 18 U.S.C. § 1341 (1980) states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

States, 122 F.2d 675, 681 (5th Cir.), *cert. denied*, 314 U.S. 687 (1941)). Viewing the evidence presented at trial in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), *United States v. Beck*, 615 F.2d 441, 447-48 (7th Cir. 1980), we find that the jury could properly infer that Zuckerman devised a scheme to defraud Zenith.

The pattern of Zuckerman's dealings with Zenith indicated that his payment of a small initial purchase was devised to lull Zenith into thinking he was a legitimate new customer, and thereby ensure that Zenith would fill his large subsequent orders. *Cf. United States v. Clark*, 649 F.2d 534, 541 (7th Cir. 1981) (payment of stock dividend lulled buyer of fraudulent stock into believing stock was legitimate). The corporate bank account used to pay Zuckerman's initial order from Zenith listed two apparently fictitious authorized signers. One of those fictitious signers, "Meyer Kaplan," purportedly signed the check sent in payment of Zuckerman's first order from Zenith. This in conjunction with Zuckerman's use of various corporate names, multiple addresses, and several aliases, could be used to conceal Zuckerman's true identity and make it difficult for Zenith to locate him. It also was undisputed that Zuckerman never paid for any Zenith merchandise after the initial order, and sold at below cost some of the Zenith merchandise he had obtained. From all of this evidence the jury could reasonably infer that a scheme to defraud existed. *See United States v. Gordon*, 580 F.2d 827, 834 (5th Cir. 1978), *cert. denied*, 439 U.S. 1051 (1979).

B

Zuckerman next argues that, even if a "scheme" existed, the mailings in this case were insufficiently related to the scheme to bring this case under the mail fraud statute. The mailings upon which jurisdiction rests in this case were the invoices sent by Zenith to Zuckerman after orders were placed in the name of Good Samaritan Hospital Supply. Zuckerman states that his "scheme" to defraud Zenith was complete after the Zenith merchandise was delivered to him. The mailings

were not necessary to acquire the goods. To the contrary, the mailing of the invoices would be against Zuckerman's interests because the mailings would trigger the time period for payment. Thus, Zuckerman argues, it would be in his interest for the mailings never to occur.

The mailings necessary to implicate the federal mail fraud statute are "caused" when a defendant " 'does not act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended.' " *United States v. Maze*, 414 U.S. 395, 399 (1974) (quoting *Pereira v. United States*, 347 U.S. 1, 8-9 (1954)). It is not necessary, then, that the defendant make the mailings, but only that the mailings be necessary to the completion of the fraudulent scheme and that the defendant reasonably foresee that the mailings would occur. *United States v. Galloway*, No. 81-1693, slip op. at 4-6 (7th Cir. Nov. 17, 1981); *United States v. Ledesma*, 632 F.2d 670, 676 (7th Cir.), *cert. denied*, 449 U.S. 998 (1980).

The mailings in this case were initiated by the defendant and were necessary to the successful outcome of his scheme. The mailings were the primary feature of the billing system which Zuckerman sought to take advantage of in order to succeed in his plan to defraud Zenith. Zenith's regular billing practice was to mail invoices at the same time or shortly after an order was shipped. Upon request by the customer, the order could be sent C.O.D. Zuckerman's order triggered the mailings, since he made no request for C.O.D. payment. Zuckerman knew that a mailed invoice would not be due for at least thirty days, and if the order was properly timed, not until forty-five days after the order was placed. The mailings therefore created the time frame for the fraud.

Thus, contrary to Zuckerman's argument, this case is not governed by *United States v. Maze*, 414 U.S. 395 (1974). There the Court held that the fruits of fraudulent use of a credit card had been received and the scheme completed before the

mailing of the credit slips to the bank for payment. The Court found the mailings to be only a result of the fraud, not a part of the scheme to defraud, and noted that the mailings in fact were contrary to the defendant's interests, since they would aid in detecting the fraud. *Id.* at 403-405. Here, the mailings implemented the billing policy that made Zuckerman's scheme possible. In effect, the mailings were similar to cases where the mailings are used to lull the victim into thinking that conduct which in fact is fraudulent is actually legitimate. *See, e.g., United States v. Heitzinger,* No. 80-2324, slip op. at 4 (7th Cir. Sept. 10, 1981); *United States v. Clark,* 649 F.2d 534, 541 (7th Cir. 1981). The mailings were necessary to provide the time to complete the scheme, that is, for Zuckerman to sell the Zenith merchandise and pocket the proceeds. The mailings therefore were sufficiently connected to the fraudulent scheme to be within the purview of the mail fraud statute.

Zuckerman also raises a related issue concerning the mailings, asserting that the district court incorrectly instructed the jury that use of the mails need not be contemplated by the defendant under the mail fraud statute.[2] In order to determine whether there is error in any particular instruction, we look to all the instructions given to determine if they fairly and

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[2] The instruction given by the court read as follows:

> The use of the United States mails in furtherance of a scheme to defraud is an essential element of the crime of mail fraud. It is not necessary that the use of the mails be contemplated by the scheme, or that defendant does any actual mailing, or intends that the mails be used. It is sufficient to establish this element of the crime if the mails were in fact used to carry out the scheme, and that the use of the mails was reasonably foreseeable.
>
> The mailed matter need not disclose on its face a fraudulent representation or purpose, or request for money, but need only be intended to assist in carrying out the scheme to defraud.

Tr. 286-87. The defendant objected to the second sentence of the first paragraph.

adequately represent the issues to be resolved by the jury. *United States v. Patrick*, 542 F.2d 381, 389 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); *United States v. Rajewski*, 526 F.2d 149, 159 (7th Cir. 1975), *cert. denied*, 426 U.S. 908 (1976). As our discussion on the elements of mail fraud indicates, the instruction given, standing alone, is not erroneous. Certainly viewed in light of all of the instructions, we find no prejudicial error.

D

The final issue raised by Zuckerman is whether the district court erred in admitting testimony that Zuckerman alleges was highly prejudicial. The disputed testimony concerns a conversation between Zenith investigator Cello and two Chicago policemen when the Zenith investigators were conducting the surveillance of Good Samaritan Hospital Supply on Irving Park Road. The Chicago policemen told Cello that Zuckerman was a "con man" and urged the investigators to get the Zenith merchandise "before it disappears out of the back door." Tr. 86.

Zuckerman made a motion in limine concerning this testimony. The government responded that while they would elicit testimony on the meeting between the police officers and the investigators, the conversation would not be testified to. Tr. 6-7. At trial, investigator Cello testified on direct examination concerning the investigation and surveillance of Zuckerman's business that culminated in the repossession from the Irving Park store of the last Zenith delivery on October 26, 1978. Cello mentioned the meeting with the police officers and stated that a conversation took place. Tr. 79. On cross-examination, Zuckerman's attorney focused his questions on the October 26 surveillance, particularly on what Cello had observed that would have justified the repossession of Zenith merchandise. The government then requested permission to ask Cello about the conversation with the police officers, to rebut the inference

raised on cross-examination that the motivation for repossession was inadequate, improper and illegal. The court granted permission on the basis that "both of you have opened the door." Tr. 85. The government then proceeded to elicit testimony about the conversation on redirect.

Under Rule 404 of the Federal Rules of Evidence, evidence of prior bad acts is admissible only if it is offered other than "to prove the character of a person in order to show that he acted in conformity therewith." FED.R.EVID. 404(b). Thus, such evidence could be admitted to rebut an inference of improper motivation raised on cross to impeach the credibility of a witness. *See generally United States v. Lea*, 618 F.2d 426, 431 (7th Cir.), *cert. denied*, 449 U.S. 823 (1980); *United States v. McPartlin*, 595 F.2d 1321, 1343 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979). Admissibility is still subject, however, to Rule 403, which requires balancing the probative value of such evidence against its potential prejudice to the defendant. We accord substantial deference to the balancing and ultimate evidentiary decision of the trial judge. *United States v. Watson*, 623 F.2d 1198, 1203 (7th Cir. 1980).

The conversation in this case clearly was prejudicial to Zuckerman. At the same time, Zuckerman's counsel had indeed "opened the door" by focusing on the motivation for investigator Cello's decision to repossess the Zenith merchandise. The statements by the police officers provided a partial explanation for Cello's conduct. While it may have been possible for the government to rehabilitate Cello without eliciting the substance of that conversation, we do not find that it was reversible error to permit that testimony.

III

For all the foregoing reasons, we AFFIRM the judgment of the district court.

FAIRCHILD, *Senior Circuit Judge*, dissenting. In my view the defendant's fraudulent exploitation of Zenith's extension of credit neither depended upon nor was furthered by the

mailing of the invoices. The mailing of invoices was an ordinary feature of Zenith's sales on credit, and certainly resulted from his activity. But that particular feature provided no advantage to the defendant. The mailings did not grant, or induce the victim to grant, the defendant credit. They did not extend the due date, delay discovery, or render the extension of credit more exposed to fraudulent exploitation. At most they triggered the count down toward the expiration of the credit period.

The mailings here did no more to execute the scheme than did the mailings held in insufficient predicate in *United States v. Maze*, 414 U.S. 395 (1974). Therefore we should reach the same result.

The defendant's payment for the first order was doubtless intended to lull Zenith and thus further the scheme, but none of the counts charged any mailing attributable to that order.

I would reverse the conviction.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 26, 1982

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* No. 81-1674 *vs.* VINCENT ZUCKERMAN, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 80 Cr 208 Marvin E. Aspen, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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FILED
SEP 22 1982
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CLERK

No. 82-109

In the Supreme Court of the United States

OCTOBER TERM, 1982

VINCENT ZUCKERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the mailing of invoices for successive orders of merchandise received on credit was sufficiently connected to petitioner's fraudulent scheme to fall within the purview of the mail fraud statute.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1982. A petition for rehearing was denied on May 26, 1982 (Pet. App. 1b). The petition for a writ of certiorari was filed on July 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on five counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to one year of imprisonment on Count I, to be followed by four years' probation on Counts IV and V. Petitioner was also fined five thousand dollars

and was ordered to pay restitution in the amount of $22,567.00 (Pet. App. 2a, 5a-6a). The court of appeals affirmed (Pet. App. 1a-11a).

1. The evidence presented at trial showed that petitioner utilized numerous businesses operating from three different addresses, as well as various aliases, as part of a scheme to defraud the Zenith Distributing Company of over $22,000 in merchandise (Pet. App. 6a-7a). In June 1977, petitioner leased a storefront in the name of Good Samaritan Hospital Supply Corporation at 9006 Waukegan Avenue, Morton Grove, Illinois. Two months later, using the name "James Breen," petitioner rented a second storefront at 2343 West Irving Park Road, Chicago, Illinois. That location was rented on behalf of the Pahsco Company, with "Breen" posing as the company's vice president. Petitioner thereafter reexecuted the lease in the name of Physicians Supply Company. At about the same time, petitioner applied for a post office box for mail delivered to Good Samaritan Hospital Supply at the Waukegan Road storefront. He then filed a change of address card for the box, listing the Irving Park Road storefront as the business' new address. Petitioner also established a bank account for Good Samaritan Hospital Supply, listing himself and two other persons on the signature card, but giving fictitious addresses for the co-signers. In September 1978, using the name "James Murphy," petitioner rented a third storefront at 6143 Touhy Avenue, Chicago, Illinois, on behalf of Surgical Supply Corporation. He then abandoned the Waukegan Road storefront (Pet. App. 2a-3a).

2. In late August 1978, using the alias "George Weiss," petitioner contacted Zenith Distributing Company on behalf of Good Samaritan Hospital Supply and requested price sheets and information on how he could become a Zenith dealer. Zenith did not require Good Samaritan

Hospital Supply to furnish a financial statement or bank and credit references before opening the account because Zenith's credit manager mistakenly assumed the company was affiliated with the Good Samaritan Hospital (Pet. App. 3a).

On August 30, 1978, "George Weiss" placed an order with Zenith for two color television sets to be shipped to the Waukegan Road storefront. Zenith mailed the billing invoice on September 5, 1978, and received full payment for the order sometime between October 10 and 12,[1] by a check drawn on the account of Good Samaritan Hospital Supply that was signed by "Meyer Kaplan" (Pet. App. 3a-4a).

From September 29 through October 24, 1978, "George Weiss" placed six additional orders with Zenith on behalf of Good Samaritan Hospital Supply. The merchandise was primarily color television sets and videotape recorders, with a total value of $24,012.17. The first two orders were billed and shipped to the Waukegan Road storefront, while the remaining four orders were billed to the vacant Waukegan Road address but shipped to the Irving Park Road storefront. Five invoices were mailed for the six orders, with the fifth invoice combining the last two orders. No payments were made to Zenith on any of these orders (Pet. App. 4a-5a).

3. Zenith became suspicious of the orders from Good Samaritan Hospital Supply when "George Weiss" called on October 24, 1978, to inquire whether any special Christmas prices would be available on videotape recorders. "Weiss" had been very reluctant to leave a return telephone number, and when a Zenith employee tried to call the number that

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[1]Under Zenith's billing procedure, payment for orders billed and shipped through the 25th of each month became due approximately the 10th of the following month (Pet. App. 3a-4a).

"Weiss" had given, there was no answer. An investigator for Zenith was also unable to reach "Weiss" at the given number. That same day, the investigator drove to the Waukegan Road storefront and observed that it was vacant, with no sign posted. The investigator then drove to the Irving Park Road storefront and saw the signs "Physicians Supply Division" and "Doctors Supply Division" posted (Pet. App. 4a-5a).

On October 26, 1978, Zenith investigators conducted a surveillance of the Irving Park Road storefront during the delivery of the most recent order of merchandise to Good Samaritan Hospital Supply. The investigators noted that a cardboard sign reading "Good Samaritan Hospital Supply Corporation," not present two days earlier, was taped to the door of the storefront. After being told by Chicago police officers that petitioner was a "con man" and that they "better get in there before that stuff disappears out the back door," the investigators entered the storefront and repossessed the merchandise they had watched being delivered (Pet. App. 4a-5a).[2]

Petitioner subsequently sold some of the remaining Zenith merchandise at below his cost. In one sale of videocassette recorders, he sent the purchasers invoices stating that they were buying syringes. Petitioner corrected the invoices at the request of the purchasers. He made no payment to Zenith on any of the merchandise received in the last six orders (Pet. App. 5a).

ARGUMENT

Petitioner contends (Pet. 4-11) that the mailings of the invoices were not sufficiently connected to his fraudulent

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[2]After deducting the value of the repossessed merchandise, petitioner owed Zenith $22,567, the amount he was ordered to pay in restitution (Pet. App. 5a-6a).

scheme to fall within the purview of the mail fraud statute. This claim does not warrant review by this Court.

The court of appeals correctly concluded (Pet. App. 8a) that "[t]he mailings in this case were initiated by [petitioner] and were necessary to the successful outcome of his scheme." As the court below explained (*id.* at 8a-9a):

> The mailings were the primary feature of the billing system which [petitioner] sought to take advantage of in order to succeed in his plan to defraud Zenith. * * * [Petitioner's] order triggered the mailings, since he made no request for C.O.D. payment. [Petitioner] knew that a mailed invoice would not be due for at least thirty days, and if the order was properly timed, not until forty five days after the order was placed. The mailings therefore created the time frame for the fraud.
>
> * * * * *
>
> [T]he mailings were similar to cases where the mailings are used to lull the victim into thinking that conduct which in fact is fraudulent is actually legitimate. [Citations omitted.] The mailings were necessary to provide the time to complete the scheme, that is, for [petitioner] to sell the Zenith merchandise and pocket the proceeds. The mailings therefore were sufficiently connected to the fraudulent scheme to be within the purview of the mail fraud statute.

Petitioner's reliance (Pet. 8-10) on *United States* v. *Maze*, 414 U.S. 395 (1974), is misplaced. In *Maze*, the defendant used a stolen credit card to charge food and lodging at several motels. The use of the mails in that case occurred when the merchants mailed the sales slips reflecting the purchases to the issuing bank, which in turn mailed them to the cardholder. Because the defendant's "scheme reached fruition when he checked out of the motel" (414 U.S. at 402), this Court held that the subsequent mailing of

the invoices was insufficient to support the mail fraud conviction. The Court in *Maze* distinguished *United States* v. *Sampson*, 371 U.S. 75 (1962), where the use of the mails, as in the present case, was "designed to lull the victims into a false sense of security" that they were not being defrauded. *United States* v. *Maze, supra*, 414 U.S. at 403.

For substantially the same reason, petitioner's assertion (Pet. 10-11) that the decision of the court of appeals in this case conflicts with *United States* v. *Keenan*, 657 F. 2d 41 (4th Cir. 1981), and *United States* v. *Green*, 494 F. 2d 820 (5th Cir 1974), cert. denied, 419 U.S. 1004 (1974), is mistaken. In both cases, on facts that bear no similarity to the facts of this case, the courts concluded that the mailing or mailings occurred after the fraudulent schemes at issue had come to fruitition.[3] By contrast, the mailings at issue here were essential to the success of petitioner's scheme. See *United States* v. *Galloway*, 664 F. 2d 161 (7th Cir. 1981), cert. denied; No. 81-1651 (June 1, 1982) (the post-sale mailing of title documents is essential to the continuation of a wholesale dealer's scheme to sell automobiles with altered odometer readings, because retail sales depend on the transfer of title).

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[3] *United States* v. *Keenan, supra*, 657 F. 2d at 42, involved the theft of roof pinning bits by means of a fabricated purchase order. The court concluded that the participants in the scheme achieved their goal at the time of the theft. In the present case, however, petitioner relied on the delay occasioned by the mailing of the five invoices to obtain repeated deliveries of merchandise from Zenith. *United States* v. *Green, supra*, 494 F. 2d at 824-825, also relied upon by petitioner, involved the identical scheme at issue in *United States* v. *Maze, supra*. For the reasons stated above, this decision does not conflict with the holding of the Seventh Circuit in this case, where petitioner's reliance on mailed invoices lulled his victim "into a false sense of security." *United States* v. *Maze*, 414 U.S. at 403.

Petitioner raises no novel issue of law, but merely questions the application of settled precedent to the discrete facts of this case. The court of appeals correctly concluded that petitioner's reliance upon mailed invoices, rather than C.O.D. payments, enabled him to place successive orders with Zenith, lulling the company into a continued extension of credit. The mailings, in short, were vital to the continuation of petitioner's scheme to defraud. On this basis, the mailings were sufficiently connected to the scheme to bring petitioner's conduct within the purview of the mail fraud statute.[4] This fact-bound conclusion is consistent with the decisions of this Court, and does not conflict with the holding of any other court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1982

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[4]Contrary's to petitioner's claim (Pet. 5-8), the court of appeals' holding in this case will not "turn[] the federal government into a collection agency without parallel for unsatisfied creditors." The holding is carefully limited to situations where use of the United States mail furthers the continuation of a scheme to defraud by preventing the victim from apprehending the nature of the scheme.

DOJ-1982-09